91-1673

FILED
MAR 26 1992
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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

ELAINE A. (BECKNER) CONNORS,
ADMINISTRATRIX, PETITIONER

V.

HOWARD JOHNSON COMPANY, RESPONDENTS.

PETITIONER FOR A WRIT OF
CERTIORARI TO THE MASSACHUSETTS
SUPREME JUDICIAL COURT

ELAINE A. (BECKNER) CONNORS
PRO SE PETITIONER
103 BROOKFIELD DRIVE
BROCKTON, MA 02402
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QUESTIONS PRESENTED

1. Did the Massachusetts Supreme Judicial Court, Massachusetts Court of Appeals and the Superior Court of Suffolk County violate the provision of the Seventh Amendment of the United States Constitution providing that "no fact tried by a jury shall be otherwise re-examined in any court of the United States and according to the rules of the common law?"

2. Did the Courts of Massachusetts violate the Petitioners "Due Process of Law" guaranteed by the Fourteenth Amendment of the United States Constitution?

3. Was the Petitioner denied her rights of due process under the

Fourteenth Amendment of the United States Constitution, because of the refusal by the Supreme Judicial Court of Massachusetts to provide a written opinion why the verdict established by a twelve person jury should be overturned notwithstanding the verdict since the lower courts could show no violation of common (English) law?

4. Did the court on a motion for a judgment notwithstanding the verdict substitute its judgment of facts for that of the jury?

LIST OF PARTIES

Elaine A. (Beckner) Connors, Petitioner

Howard Johnson Co., Respondents

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STATUTE INVOLVED

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U. S. Constitution Amendment XIV

MISCELLANEOUS

Concise History of the Common Law 120-131 (5th Ed. 1956)

Moore's Federal Practice Rule 38, 12

IN THE SUPREME COURT OF

THE UNITED STATES

October Term 1991

ELAINE A. (BECKNER) CONNORS
Administratrix, Petitioner

v.

HOWARD JOHNSON COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

The Petitioner, Elaine A. (Beckner) Connors respectfully prays that a Writ of Certiorari be issued to review the judgment of the Massachusetts Supreme Judicial Court, entered in the above entitled proceedings on November 26, 1991.

OPINIONS BELOW

The final decision of the Massachusetts Supreme Judicial Court not to provide further Appellate review was decided on November 26, 1991, but Petitioner did not receive notice until December 28, 1991. Previous requests for further Appelate review were denied on July 30, 1991 and June 24, 1991 without written opinions.

On appeal to the Massachusetts Court of Appeals to reverse the judgment, notwithstanding the verdict, reached by the Superior Court of Suffolk County, was denied on May 16, 1991.

Other opinions of Judges of the Superior Court of Suffolk County established that the Statute of Limitations had not expired. First,

by Judge Quirico on May 12, 1982, and affirmed by Judge Tuttle on July 29, 1986. Judge Young ruled that the Petitioner had a Prima Facie Case in 1985.

JURISDICTIONS

The Petitioner brought suit in Massachusetts Superior Court for Suffolk County on May 21, 1981 against the Howard Johnson (Company) for the Company's breach of the implied covenant of good faith and fair dealings. Following a trial completed on July 16, 1987 in which the jury found for Petitioner and awarded a total of $1,250,000--$500,000 for misappropriation of trade secrets and $750,000 for breach of the implied covenant of good faith and fair dealing. The trial judge over ruled the jury's finding in notwithstanding the verdict (N.O.V.). Federal Jurisdiction is requested under the provisions of the Seventh and the Fourteenth Amendment of the U. S. Constitution, and Supreme Court Rule 10.1 (c).

SUPREME COURT OF THE UNITED STATES

No.

A-610

Elaine A. Connors,

Petitioner

v.

Howard Johnson Company

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 27, 1992.

/s/ David H. Souter
Associate Justice of the Supreme Court
of the United States

Dated this 20th day of February, 1992.

STATUTE INVOLVED

28 U.S.C. s 1291. Final decisions of district courts.

The Court of Appeals, (other than the United States Court of Appeals for the Federal Circuit),shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except for a direct review, may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

STATEMENT OF CASE

Elaine A. Connors (f/k/a) Elaine A. Beckner, Administratrix of the Estate of Paul H. Beckner ("Connors"), brought this action to recover damages arising from Howard Johnson Company's ("the Company") wrongful use of formulas, processes and procedures ("formulas") for making certain flavors of ice cream which had been developed by Paul H. Beckner ("Beckner"), Connors' former husband. Beckner developed formulas many years prior to joining the Company and the Company continued using the formulas without permission after Beckner's death.

REASON FOR GRANTING THE WRIT

The United States Supreme Court in the decision held in E. W. Bliss v. United States, 63 L.E.D. 114 stated "the case is precisely analogous to a suit to enjoin the unauthorized use or disclosure of a trade secret. In such cases the courts are agreed that the inventor or assignee of a secret device or process may maintain a suit in equity against one who, in violation of a contract, expressed or implied, or in breach of a confidential relationship, undertakes to divulge the secret or to appropriate it to its own use, regardless of whether or not the secret device or process is a proper subject for a patent. Connors seeks further Federal Appelate review from the

Massachusetts Court of Appeals conclusion, that where an employer hires an inventor for the purpose of gaining access to the inventor's trade secret, the employer has the right to unlimited use of that trade secret after that employer terminates the employee.

The refusal by the Massachusetts Supreme Judicial Court (M.S.J.C.) to examine the findings of the Court of Appeals and the Trial Court, constituted denial of due process under the Fourteenth Amendment and the provision of the Seventh Amendment forbidding re-examination of any fact tried by jury in any court of the United States "other than according to the rules of the common law and the common law alluded to is the English common law." Moore's

Federal Practice, Rule 38.12. Justice O'Connor dissenting in Pacific Mutual Life Ins. Co. v. Haslip 111 s. Ct. 1032 (1991) stated that due process requires that a state provide meaningful standards to guide the application of its laws. See Kolender v. Lawson, 461, U. S. 352. Quoting from Pacific Mutual at 1057, Justice Black wrote for the court "certainly one of the basic purposes of the due process clause has always been to protect the person against having the Government impose burdens upon him except in accordance with the valid laws of the land."

The Massachusetts courts have found that a court may not substitute its judgment of facts for that of the jury, O'Shaughnessy v. Besse, 389 N. E. 2d

1049, 7 Mass. App. Ct. 727 (1979). The Trial Court and the Court of Appeals imposed its judgment of the facts, despite the jury's consideration of the evidence and the credibility of witnesses for 5 1/2 days and their deliberation for 1 1/2 days, before reaching a verdict for the plaintiff. Justice Kennedy concurring in the judgment of Pacific Mut. at 1055 quoting Plucknett, A Concise History of the Common Law 120-131 (5th Ed. 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel the presentation of evidence and instructions from the trial judge, subject to review by the Trial and Appelate Courts. There is a principled

justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community. Did the Trial Court exceed its judicial discretion by erroneously and improperly interpreting the facts found by the jury in its favorable verdict for the Petitioner? Petitioner believes her Seventh Amendment protection against re-examination of the jury's verdict other than according to the rules of Common Law were violated. The Trial Court and the Court of Appeals could not cite any statutory law to support their decisiion to reverse the jury's verdict. The Court's decision to reverse the verdict of the jury were based primarily on the Statute of Limitations and <u>their</u>

interpretation of the written contract. Quoting from Pacific Mutual Life at at 1055, the Court found that the features of the jury system produce collective judgments often are difficult to explain, but the inherent lack of predictability of jury decisions does not justify condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that built discretion, equity, and flexibility into a legal system. McCleskey v. Kemp, 407 S. Ct. 1756. The Petitioner was denied her due process rights because the M.S.J.C. refused to review evidence substantiating errors committed by lower Courts on three different applications for Appelate

review. As the Court reiterated in Twining v. New Jersey., 211, U.S., 78, 29, S. Ct. 14, 53 L. Ed. 97 (1908), "consistently with the requirements of due process, no change in ancient procedure can be made which disregard those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen of his private right, and guard him against the arbitrary action of government." The judgment of the Courts of Massachusetts in the instant case represent actions that can only be described as arbitrary and bias in favor of the Respondents despite the unanimous conclusions of the jury. The Trial Court obviously adopted verbatim

findings of the Respondents. Evidence of the Trial Courts bias and prejudice can be demonstrated by the pressure of the trial judge to have the parties negotiate an "out of court settlement" after the verdict. If the court determined that the Respondents were not liable for damages and that Petitioner did not deserve a judgment in her favor based on the evidence, why did the Trial Judge encourage an "out of court settlement" on several occasions?

The Trial Court's decision to grant Howard Johnson's motion for judgment notwithstanding the verdict was based on two limited issues, the Statute of Limitations and the interpretation of a written contract. The Statute of Limitation argument was addressed in

a decision dated July 29, 1986 by Judge Tuttle, Justice of the Superior Court and is reproduced in the Appendix as Exhibit A.

The Appeals Court held that absent evidence that employee ever sought to impose restriction on employer's use of formulas, manufacturers use of formulas was consensual.

The jury decided after careful consideration of the testimony, examination of the physical evidence, and the credibility of the witnesses, that their verdict was just. The Trial Court had carefully instructed the jury on thirteen counts which jury rendered its verdict. Two questions regarding

the jury's findings of damages, in the opinion of the judge, appeared inconsistent. The Trial Judge denied the jury the opportunity to return to the jury room to resolve their apparent inconsistencies to the Judge's confusing instructions as was requested by Petitioner's counsel.

This case is unique as a case of First Impression of which an employee brings trade secrets to an employer together with processes and procedures developed over twenty years prior to his employment with the Company.

In this respect, this case differs from decisions such as Jet Spray Cooler v. Crampton, 361 Mass. 835 (1972) and implied restriction of employer's secrets and misappropriation of a trade secret. See Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939 (1984)

Klein v. Catalano, 386 Mass. 7601, 710, (1982), U.S.M Corp. v. Marson Fastener Corp., 379 Mass. 90 (1979), Burton v. Milton Bradley Co., 763 F. 2d 461, 462-463 (1st Cir. 1985).

CONCLUSION

For the reasons cited above, the Petitioner, Elaine A. (Beckner) Connors, respectfully submits that the verdict of the jury be allowed to stand and the decision of the Courts below reversed.

Respectfully submitted,

Elaine A. (Beckner) Connors, Pro Se
Petitioner-Appellant
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ELAINE A. CONNORS, administratrix, 1 VS. HOWARD JOHNSON COMPANY.

No. 89-P-507.

Suffolk April 9, 1990-May 16, 1991.

Present: Armstrong, Kass, & Smith, JJ.

Trade Secret. Contract. Performance and breach. Trust. Breach of trust. Practice, Civil. Costs.

Civil action commenced in the Superior Court Department on May 21, 1981.

The case was tried before Barbara J. Rouse, J.

Stephen S. Young (Joshua C. Krumholz with him) for the plaintiff.

Laurie S. Gill (Francis C. Lynch with her) for the defendant.

ARMSTRONG, J. Thirteen years after the death of Paul H. Beckner, who had been employed as a quality control

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1/ of the estate of Paul H. Beckner.

manager at the Howard Johnson Company's ice cream manufacturing plant in Brockton, his administratrix brought this action for damages for breach of contract, breach of trust, and misappropriation of trade secrets. The theory of the action was that Beckner, who had been employed by another ice cream maker, Lewis Sherry, in the 1940s and had then gone unsuccessfully into business for himself, was hired by the defendant in 1952 to take advantage of his superior formulas for ice creams; that they entered into a written contract in 1958, giving the defendant propriety rights to ice cream flavors and formulas developed by Beckner for the defendant (but not for those he developed earlier; that the defendant continued to use the early Beckner formulas after his death in 1968,

which constituted a breach of contract and a misappropriation of trade secrets; and that the defendant's secret use of the early formulas after Beckner's death and its failure to compensate his estate for such use, constituted a breach of fiduciary duty to Beckner's estate. After a jury returned verdicts for the estate totaling $1,250,000, 2/ the judge entered a judgment for the defendant notwithstanding the verdict, from which judgment the plaintiff has appealed.

At the foundation of the plaintiff's various theories of liability was an assumption that the defendant's right to use the formulas that Beckner brought with him when he began his employment with the defendant terminated at Beckner's death. There was in the evidence no basis for that assumption. We can assume, with the

plaintiff, that the formulas for making the four flavors at issue (see note 2) could be the subject of a trade secret, compare Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937 (1984), and that the evidence supported findings that the defendant switched to Beckner's formulas for manufacturing the flavors in question after Beckner was hired in

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2/ In answers to special questions, the jury found that Beckner's formulas for vanilla, chocolate, strawberry, and coffe ice creams were Beckner's trade secrets and that the defendant's continued use of those formulas after Beckner's death constituted a misappropriation, for which it awarded $500,00. Possibly inconsistently, the jury also found that Beckner did not possess written formulas for those flavors that the defendant used without authority after his death, and that the defendant was not in breach of its written contract with Beckner by using

1952 and continued to use them to the time of trial. But the defendant's use of the formulas was obviously consensual and of right, and nothing in the record shows that the right was the subject of restriction or condition. the evidence that the formulas were kept as a guarded secret, shared only by Beckner and a small group of authorized personnel, may

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those formulas without compensation after his death. Despite the last finding, the jury found that the defendant was in breach of an implied contract of good faith and fair dealing arising from the 1958 employment contract by using the formulas after his death. For that breach the jury awarded $750,000. The plaintiff took the position that these awards should be aggregated. The defendant argued that they were simply inconsistent verdicts. The judge was not required to decide because she vacated both verdicts.

tend to show that the formulas were guarded from discovery and use by competitors but not that they were guarded by Beckner from use by the defendant.

In Chadwick v. Covell, 151 Mass. 190, 191 (1890) it was said of medicines formulated and marketed by a Dr. Spencer that he "had no exclusive right to use of his formulas. His only right was to prevent any one from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will." See also Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 165 (1921) ("The fact that an invention is patentable does not compel the taking out of a patent, nor prevent the person

entitled to it from keeping it secret, nor bar him from equitable relief against those disclosing its existence and details in violation of trust and confidence, nor as against those who obtain knowledge through such violation with notice and purpose to make use thereof. The fundamental requirement for relief is a violation of trust and confidence. Any one who gets the knowledge honestly can use it provided he is not restrained by the relationship under which he acquired it. (Citations omitted.]") The principle was reaffirmed more recently in Jet Spray Cooler, Inc. v. Crampton, 377 Mass. 159, 165 (1979): "The essence of an action for the wrongful use of trade secrets is the breach of the duty not to disclose or to use without permission confidential information acquired from

another. [Citations omitted.] See generally Restatement of Torts S 757 (1939). . . ." 3/

There was no evidence of any agreement, oral or written, between the defendant and Beckner in 1952 concerning the use of the formulas. The plaintiff may be correct in contending that the evidence warranted a finding that the defendant's purpose in hiring Beckner was to use those formulas and to employ Beckner's skill in devising new or improved formulas; but there is no

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3/ Section 757 reads: "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him, or (c) he learned the secret from a third person with notice of

showing that the defendant violated any obligation it had assumed under that oral employment contract. In 1958 Beckner signed a five-year employment agreement with the defendant which provided that "any and all inventions, processes, methods, formulae, or other improvements created or developed by the Employee [i. e., Becker], in connection with his employment, shall belong to the Employer, shall be fully disclosed to the proper officers of the Employer and shall be transferred to the Employer

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the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake."

upon request." 4/ The effect of this clause would have been to restrict Beckner's use of formulas he developed while in the defendant's employ. It cannot be read as restricting the defendant's use of Beckner's early formulas after his employment should terminate. The evidence does not show that Beckner ever sought to impose such a restriction. "One who possesses a

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4/ This was apparently a standard form contract used by the defendant (two identical contracts with other employees appear in the record), with blank spaces for name of employee, the date of signing, and the annual salary. Beckner's contract was renewed once, for a second five-year period. the defendant gave notice of its intention not to renew it for a third five-year period, but Beckner,who had been ill for several years, died before the second contract period ended.

trade secret and wishes to protect it must act to preserve its secrecy." USM Corp. v. Marson Fastener Corp., 379 Mass. 90, 97 (1979), and cases cited. His formulas may have been a trade secret from the rest of the world but not from the defendant. the judge correctly ordered that judgment be entered for the defendant notwithstanding the jury's verdict.

The plaintiff appealed also from an order that she pay the defendant's costs in the amount of $12,802.19, including a substantial sum for the fees of two expert witnesses. The plaintiff does not challenge the authority of the court to tax such fees, as opposed to the statutory witness fees taxable under G. L. c. 262, S 29. See Goulet v. Whitin Mach. Works, Inc., 399 Mass. 547, 555 (1987), where taxing such fees seems to

have been approved. Compare Linthicium v. Archambault, 379 Mass. 381, 389 (1979) (expert witness fee may be taxed as costs in actions under G. L. c. 93A, which represents a statutory exception to the usual rule that a litigant must bear his own expenses). See also Creed v. Apog, 377 Mass. 522, 524-526 (1979), relative to taxing bonding costs, and Mass.R.Civ.P. 54 (E), 382 Mass. 829 (1981), relative to taxing deposition costs.

Rather, the appeal is put on the basis that the expert witness fees should not have been taxed as costs because the judge did not rely on their testimony in rendering judgment for the defendant. The judge's reliance on another ground does not preclude recovery of the costs in question. A litigant will often prudently offer

several alternative grounds for the decision, not knowing which may succeed and which may fail. If the testimony of the expert witnesses were of marginal relevance or excessive in scope or cost, the judge should of course disallow some or all of the costs; but their testimony in this case was clearly germane, and the judge exercised her discretion to reduce the requested fees substantially. Assuming the authority existed, there was no error.

Judgment affirmed.

Order taxing costs affirmed.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.
May 27, 1988

SUPERIOR COURT
CIVIL ACTION
NO. 48413

ELAINE A. CONNORS1/

VS.

HOWARD JOHNSON COMPANY

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The plaintiff, Elaine A. Connors, brought this action against the defendant, Howard Johnson Company (Howard Johnson), alleging that it had misappropriated her deceased husband's formulas and methods for the making of certain ice cream flavors, that it had breached a written contract with him,

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1/ f/k/a Elaine A. Beckner, administratrix of the estate of Paul Beckner.

that it had breached the implied covenant of good faith and fair dealing, that it had wrongfully converted his formulas, and that it had breached a constructive trust. All claims were tried before a jury (Rouse, J., presiding), except the constructive trust, which was reserved for the court by agreement of the parties.

Based on all of the credible evidence presented at trial, and after consideration of oral arguments and all relevant submissions, I make the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. The plaintiff resides at 103 Brookfield Drive in Brockton, Plymouth County, Massachusetts, and is the administratrix of the estate of Paul H. Beckner (Beckner), her former husband.

2. Howard Johnson is a foreign corporation having a principal place of business at One Howard Johnson Plaza, in Boston, Suffolk County, Massachusetts.

3. In 1952, Beckner came to work for Howard Johnson as a quality control inspector. His job was to ensure that the quality of the ice cream which Howard Johnson manufactured was consistent at all of the company's manufacturing facilities and to do whatever was necessary to improve the ice cream.

4. Prior to 1952, Beckner had worked for the Louis Sherry Company in

New York as general manager and had worked in the ice cream industry for 15 years. He was a sophisticated businessman in the ice cream industry.

5. On May 20, 1958, Beckner and Howard Johnson entered into a written employment contract for a term of five years automatically renewable for a further five years unless written notice of termination was given at least 30 days prior to the expiration of the contract. In 1963, the contract was renewed, but in January, 1968, Howard Johnson gave notice of its intention to terminate on May 20, 1968.

6. On April 25, 1968, Beckner died. At the time of his death, the contract was in effect and, therefore, he was still employed by Howard Johnson.

7. There was insufficient evidence that Beckner brought or conveyed

anything in confidence to Howard Johnson when he came to work for them.

8. There was insufficient evidence that Howard Johnson had used any particular formulas or methods for the flavors of vanilla, chocolate, strawberry or coffee ice cream developed by Beckner.

9. There was no evidence that Beckner placed any restrictions on Howard Johnson's use of any information which he may have given to it. Beckner's employment contract contains no language which could support a finding that Beckner imposed any requirement of trust or confidence on Howard Johnson's use or receipt of his information, or any language restricting Howard Johnson's right to use this information.

10. Beckner did not place any special confidence, trust, or reliance

in Howard Johnson.

11. Howard Johnson was not, and had no reason to be, aware of any special trust, confidence, or reliance that Beckner may have placed in it.

12. Howard Johnson did not exercise any greater influence or superiority over Beckner than over other employees.

13. Beckner never brought to the attention of Howard Johnson that he considered that he had a confidential relationship with the company.

14. Any information which Beckner may have given Howard Johnson was used only as intended by Beckner and Howard Johnson--to improve Howard Johnson ice cream.

15. There is no evidence that anything Paul Beckner may have contributed to the manufacture of chocolate, strawberry, vanilla, and

coffee ice cream at Howard Johnson contributed to the gross profits earned by Howard Johnson on the sale of those flavors.

16. Long before Beckner's death in 1968, the plaintiff had been told by Beckner that Howard Johnson had hired him for his formulas of vanilla, chocolate, strawberry, and coffee ice cream.

17. The plaintiff knew that Howard Johnson, after Beckner's death, never asked for her permission to continue using Beckner's formulas and that she was receiving no compensation for the use of any of his formulas or methods.

18. The plaintiff knew within a reasonable period of time after Beckner's death in April, 1968, all of the facts necessary to file a lawsuit against Howard Johnson, or had the means

to acquire such facts.

19. There was insufficient evidence that the vanilla, chocolate, strawberry, and coffee ice cream manufactured Howard Johnson did not change after Beckner's death.

20. There was no fiduciary relationship between Beckner and Howard Johnson which imposed any duty on Howard Johnson to disclose to the plaintiff that it was using, if it was, Beckner's formulas or methods for making ice cream.

21. Howard Johnson did not conceal any facts from the plaintiff concerning its use, if any, of Beckner's formulas or methods for making ice cream.

22. The plaintiff waited over 13 years after Beckner's death before bringing this lawsuit. she unreasonably delayed in bringing suit and was not diligent in pursuing her claims.

23. Howard Johnson was prejudiced as a result of the plaintiff's delay in bringing suit because the two primary persons who had personal knowledge concerning the circumstances surrounding Beckner's employment were George R. Pitman, Beckner's supervisor, and Howard D. Johnson, both of whom died in the 1970's.

24. Howard Johnson was also prejudiced as a result of the plaintiff's delay in bringing the law suit because most of the company's relevant documents and records were no longer available.

25. Beckner and Connors knew, after Beckner received notice in January of 1968 that his contract would not be renewed, that Hoard Johnson believed it was entitled to and intended to continue manufacturing ice cream in the same way

as it had while Beckner was employed.

26. Howard Johnson believed it was entitled to continue after Beckner's death to manufacture ice cream in the same way it had before.

27. Neither Beckner nor the plaintiff ever notified Howard Johnson prior to 1981 of any objection they might have had to the company's continuing to manufacture ice cream in the same way as it had during the time Beckner was employed.

CONCLUSIONS OF LAW

1. There was no fiduciary relationship between Howard Johnson and Beckner which would warrant the imposition of a constructive trust upon any of the profits Howard Johnson derived from the sale of vanilla, chocolate, strawberry and coffee ice cream. A fiduciary

relationship does not exist merely because the parties are employer and employee. Sbrogna v. Worcester Stamped Metal Co., 354 Mass. 17, 20 (1968).

2. There was no wrongful use of any confidential information given by Beckner to Howard Johnson which would warrant the imposition of a constructive trust upon any of the profits Howard Johnson derived from the sale of vanilla, chocolate, strawberry and coffee ice cream. Barry v. Covich, 332 Mass. 338, 342-343 (1955).

3. A constructive trust is an equitable remedy imposed to prevent one party from being unjustly enriched at the expense of another. Id. at 342.

4. Howard Johnson has not been

unjustly enriched through the use of anything brought to the company by Beckner.

5. The plaintiff's claims are barred under the doctrine of laches because she unreasonably delayed in bringing this lawsuit with the result that Howard Johnson was prejudiced and placed at a disadvantage in defending the action. Norton v. Chioda, 317 Mass. 446, 452 (1945).; Three Sons, Inc. v. Phoenix Ins. Co., 357 Mass. 271, 278 (1970); Yetman v. City of Cambridge, 7 Mass. App. Ct. 700, 707 (1979).

6. The plaintiff's failure to object to Howard Johnson's continuing to manufacture ice cream in the same way after Beckner died estopps her from recovering on any of her

claims. Restatement (Second) of Tort, S 894 (2).

ORDER

For all of the foregoing reasons, it is hereby ORDERED that judgment shall enter for the defendant Howard Johnson Company on Count V. of the complaint.

Barbara J. Rouse
Justice of the Superior Court

DATED: May 27, 1988.

C1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

June 1, 1988

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT

NO. 48413

ELAINE A. CONNORS (F/K/A ELAINE A. BECKNER) ADMINISTRATRIX OF THE ESTATE OF PAUL H. BECKNER

VS.

HOWARD JOHNSON COMPANY

FINAL JUDGMENT

This matter came on for trial before the Court and a Jury, Rouse, J. presiding, and the issues having been duly tried to a Jury on Counts I, II, III and IV and the jury having duly rendered its verdict; and having been tried to the Court on Count V, and Findings of Fact, Conclusions of Law and Order and a Memorandum of Decision and Order on Defendant's Motion for Judgment Notwithstanding the Verdict having been

rendered, it is hereby ORDERED and ADJUDGED as follows:

1. Counts I, II, III and IV: That the plaintiff take nothing of the Defendant; and that Counts I, II, III and IV be, and are hereby Dismissed on the merits.

2. Count V: That the plaintiff take nothing of the Defendant and that Count V be, and hereby is, Dismissed on the merits.

DATED AT BOSTON, MASSACHUSETTS THIS 31ST DAY OF MAY 1988

MICHAEL JOSEPH DONOVAN
CLERK/MAGISTRATE

BY:_____
ASSISTANT CLERK

JUDGMENT ENTERED ON DOCKET JUNE 1, 1988 PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P 58(a) AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P. 77(d) AS FOLLOWS:

A TRUE COPY OF JUDGMENT DULY ENTERED ON JUNE 1, 1988.

D1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
July 29, 1986 NO. 48413

ELAINE A. CONNORS (F/K/A ELAINE A. BECKNER), ADMINISTRATRIX OF THE ESTATE OF PAUL H. BECKNER

v.

HOWARD JOHNSON COMPANY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Procedural Background

The present complaint was originally filed on May 21, 1981 with the Suffolk Superior Court and an amended complaint was filed on May 27, 1981. The case was subsequently removed to federal court, but after extended argument, was remanded to Suffolk Superior Court on March 1, 1982. The defendant Howard Johnson Company ("HJ")

then filed a motion to dismiss all five counts of the amended complaint. On May 12, 1982 this court (Quirico, J.) allowed that motion only as to Count I, which alleged breach of both an oral contract and an implied covenant of good faith and fair dealing associated with that contract, on the ground that it was barred by the applicable statute of limitation.

This action now comes before the court on HJ's motion for summary judgment brought pursuant to Mass. R. Civ. P. 56 on Counts II through V of the Plaintiff's amended complaint. Count II alleges that the defendant breached a written contract during the term of employment as well as breached an implied covenant of good faith and fair dealing associated with that contract. Count III alleges the same breaches as

Count II but applies to the period after the employment terminated. Count IV alleges the tort of conversion. finally, Count V asserts that HJ breached its fiduciary duties to the plaintiff and asks for the imposition of a constructive trust in the plaintiff's favor. For the reasons stated below the motion for summary judgment is denied on all counts.

Factual Background

Prior to 1953 the plaintiff Elaine A. Connors' ("Connors") former husband Paul H. Beckner ("Beckner"), now deceased, worked for fourteen years as general manager for the Louis Sherry Company, a manufacturer of ice cream products. In 1951 Beckner was offered employment by HJ but did not begin to work then. At some time still prior to 1953 Beckner allegedly developed certain

formulae, processes and procedures (hereinafter "formulae") for making and/or improving ice cream. In 1953 Beckner began employment with HJ in quality control at its Brockton ice cream manufacturing plant. HJ allegedly hired Beckner in order to have him utilize his ice cream formulae for making or improving HJ's ice cream. From 1953 until May 20, 1958 Beckner had no written employment contract with HJ, and during this period he allegedly used his ice cream formulae to make and improve HJ's ice cream. At no time during this five year period did Beckner transfer his allegedly secred formulae to HJ. Beckner allegedly mad all possible efforts to keep his formulae secret while still utilizing the formulate to make and improve HJ's ice cream.

On May 20, 1958 Beckner and HJ

entered into a written employment contract. This contract was for a five year term and provided for automatic renewal for additional five year periods unless written notice of termination was provided by either party. Paragraph 4 of the contract provided "[t]hat any and all inventions, processes, methods, formulae or other improvements created or developed by the Employee in connection with his employment shall belong to the Employer, shall be fully disclosed to the proper officers of the Employer and shall be transferred to the Employer upon request."

During his years with Howard Johnson, Beckner was observed to possess a black notebook in which he allegedly kept his secret ice cream formulas. Neither Connors nor HJ knows the current whereabouts of the notebook. At no time

during the period May 20, 1958 until Beckner's death on April 25, 1968 did Beckner transfer any formulae to HJ and during this period he allegedly made all possible and reasonable efforts to avoid divulging his formula to HJ.

In 1964 Beckner broke his back in a fall and then suffered brain damage in a subsequent medical procedure. He was nevertheless continued as a home consultant with HJ under his written contract. By a letter dated January 17, 1968 HJ notified Beckner that it would not renew his employment contract when it expired on May 20, 1968. On April 25, 1968, prior to the expiration date of his employment contract, Beckner died.

The plaintiff alleges that from 1953 through April 25, 1968 and up to the present HJ used and continues to use

Beckner's secret formulae without authorization or right to do so; that Howard Johnson knowingly and intentionally concealed from Beckner both the true worth of his formulae and its own continuing use and possession of his formulae; that a fiduciary relationship existed between Beckner and HJ pertaining to the formulae Beckner developed prior to his employment with HJ; and that this fiduciary relationship continues to exist between HJ and Connors as Beckner's legal representative.

Discussion

Mass. R. Civ. P. 56 (c) provides that summary judgment:

> "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

> if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The party moving for summary judgment has the burden of establishing that no genuine issue exists as to any material fact. Attorney General v. Bailey, 386 Mass. 367, 371 cert. denied, 459 U.S. 970 (1982). In considering the materials accompanying the motion, "the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." Id. at 371.

HJ's motion for summary judgment as to Counts II and III of Connors' amended complaint - breach of the written employment contract during and after

Beckner's employment with HJ - is based on the ground that it has fulfilled all its contractual obligations and is therefore not in breach of the contract. 1/ The defendant's motion is denied as to these counts because there are disputed issues of material fact as to, first, whether the parties intended to imply in the contract that any formulas developed by Beckner prior to his employment with HJ would be his exclusive property and second, if this is so, whether HJ violated this implied term by appropriating these formulas without providing compensation to Beckner.

1/ The defendant concedes that there is no statute of limitations problem with this particular claim as the 20 year provision for contracts under seal clearly applies. See M.G.L. c. 260, S 1.

HJ's motion for summary judgment as to those parts of Counts II and III which allege breach of an implied covenant of good faith and fair dealing is based first, on the ground that the statute of limitations bars this claim and second, if not time-barred, on the ground that there was no violation of any such implied covenant.

The statute of limitations issue was already decided against HJ by this court (Quirico, J.) on May 12, 1982. "Where there has been no change in circumstances, a court or a judge is not bound to reconsider a case, an issue, or a question of fact or law, once decided." Peterson v. Hobson, 306 Mass. 597, 599 (1940). 2/ HJ has set forth no changed

2/ The fact that HJ's 1982 motion was brought pursuant to Mass. R. Civ. P. 12 (b) (6) and that its current motion is based on R. 56 is of no

circumstances. Furthermore, this court agrees that the statute of limitations has not yet run against the claim of breach of an implied covenant of good faith and fair dealing. M.G.L. c. 260, S 2, which applies to actions of contract, express or implied, does not apply when the implied covenant of good faith and fair dealing is associated with a contract under seal. 3/ Rather, c. 260, S 1, affording a twenty year limitations period to contracts under seal, is the proper provision to apply to the covenant which runs with that contract.

The question of whether there was any violation of the implied covenat is a disputed question of material fact.

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consequence when the R. 56 motion relies on the same grounds and showings as an earlier-denied motion to dismiss. See 8 Mass. prac. Series 347 (Smith and Zobel).

HJ's motion as to this claim is therefore denied.

HJ's summary judgment motion as to Count IV's allegation of conversion is also based on two grounds; first, that the statute of limitations, M.G.L. c. 260, S 2A, bars this claim and second, if not time barred, then there was no conversion.

The three year statute of limitations, c. 260, S2A, would

3/ Solomon v. Birger, 19 Mass. App. Ct. 634 (1985), upon which HJ relies, is clearly distinguishable. There the plaintiff attempted to piggyback an action sounding in tort onto a sealed contract in order to gain the advantages of the twenty year statute of Limitations. The Appeals Court held that the twenty year provision did not apply to the tort action. In the present case the plaintiff seeks to gain the advantage of the twenty year limitations period

ordinarily bar this claim because the plaintiff waited more than three years from the date Beckner died. 4/ before filing this lawsuit. Chapter 260, S 12, however, provides for the tolling of a statute of limitations in circumstances where there is a duty to reveal, such as in a fiduciary relationship, and no revelation has been made. Stetson v. French, 321 Mass. 195, 199 (1947).

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for sealed contracts in the case of a covenant implied in law which runs with that sealed contract. The policy reason utilized by the Solomon court in denying to the plaintiffs the use of the longer limitations period, i.e., "the ephemeral nature of unwritten representations", while applicable to an allegation of deceit, is simply not relevant to a covenant which is created by law.

While in general an employer-employee relationship is not a fiduciary one, Sbrogna v. Worcester Stamped Metal Co., 354 Mass. 17, 20 (1968), "whether a relationship of trust and confidence exists is a question of fact...". Markell v. Sidney B. Pfeifer Foundation, Inc., 9 Mass. App. Ct. 412, 444 (1980). The plaintiff has set forth sufficient factual allegations to raise a factual controversy over whether a fiduciary relationship existed between HJ and Beckner such that HJ would have had a duty to reveal the existence of facts, if any, underlying a cause of action. Summary judgment on this issue is therefore denied.

4/ The latest date that any conversion could have occurred, if at all, would have been in1968 when Beckner died.

HJ also argues that even if Count IV's conversion claim is not barred by the statute of limitations, summary judgment should be granted on the merits because there was no conversion. On this question there are clearly disputed issues of fact which require denial of HJ's motion. 5/

The defendant's motion for summary judgment as to Count V - breach of fiduciary duty - is based on grounds that the statute of limitations has expired and, if not, that there was no breach of any fiduciary duty. As mentioned above, this court (Quirico, J.)

5/ In Count IV of the complaint Connors alleges that HJ converted formulae developed by Beckner "both before and during his employment" (emphasis added) with HJ. The contract between Beckner and HJ, however, clearly gives HJ rights

has already decided the statute of limitations question and this court will not reconsider it. There are disputed issues of material fact as to whether any fiduciary relationship existed and if so whether any breach occurred. Summary judgment on this last issue is therefore denied.

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to formulae developed by Beckner during his employment. In fact, plaintiff concedes in her memorandum of law at 15 n.4 that she is not claiming that HJ engaged in wrongful conduct concerning formulae developed by Beckner during his employment with HJ.

ORDER

HJ's motion for summary judgment is denied on counts II through V of plaintiff's amended complaint.

Elbert Tuttle
Justice of the
Superior Court

Dated: July 29, 1986

Supreme Judicial Court
for the Commonwealth of Massachusetts

ELAINE A. CONNORS, administratrix vs. HOWARD JOHNSON COMPANY	
TRIAL COURT: Suffolk Superior TRIAL COURT NO. 48413 TRIAL JUDGE: Rouse, J. A.C. No. 89-P-507 A.C. Entry: A.C. RESCRIPT: 5/16/91	COUNSEL FOR PLAINTIFF: Stephen S. Young, Esq. Joshua C. Krumholz, Esq. Ieuan G. Mahony, Esq. SHERBOURNE, POWERS & NEEDHAM One Beacon Street Boston, MA 02108 Tel. 523-2700 COUNSEL FOR DEFENDANT: Francis C. Lynch, Esq. Laurie S. Gill, Esq. PALMER & DODGE One Beacon Street Boston, MA 02108- Tel. 573-0100

6/5/91	APPLICATION of the Plaintiff for Further Appellate Review
6/18/91	OPPOSITION of the Defendant for Further Appellate Review
6/24/91	DENIAL of Application for Further Appellate Review

ELAINE A. CONNORS, administratrix vs. HOWARD JOHNSON COMPANY

7/17/91	MOTION of the Plaintiff for Reconsideration of the Denial for Further Appellate Review.
7/17/91	CLERK'S LETTER to Elaine A. Connors regarding motion for reconsideration.
7/30/91	DENIAL of Reconsideration of the Denial of the Application for Further Appellate Review.
10/28/91	RECEIVED a copy of a letter from the Supreme Court of the United States regarding a filing of extension of time for Petition for Writ of Certiorari.
10/19/91	SECOND MOTION for Reconsideration of denial of application for further appellate review.
11/26/91	DENIAL of second petition for re-consideration.

Supreme Court, U.S.
FILED
APR 24 1992
OFFICE OF THE CLERK

No. 91-1673

In the
Supreme Court of the United States

OCTOBER TERM, 1991

ELAINE A. CONNORS,
PETITIONER,

v.

HOWARD JOHNSON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MASSACHUSETTS APPEALS COURT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 24, 1992

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

COUNTERSTATEMENT OF THE ISSUE

Whether the Massachusetts state courts' action in granting and upholding judgment notwithstanding the verdict and denying further appellate review of that action violated either the Seventh Amendment or the Due Process Clause of the Fourteenth Amendment?

RULE 29.1 LISTING

The respondent Howard Johnson Company, now known as Marriott Family Restaurants, Inc., is a wholly owned subsidiary of Marriott Corporation. Its non-wholly owned subsidiaries are Marriott Family Restaurants, Inc. of Illinois; Marriott Family Restaurants, Inc. of Vermont and Marriott's Bickford's Family Fare, Inc.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Mrs. Connors, as administratrix of the estate of Paul Beckner ("Beckner"), brought this action in 1981 for damages for breach of contract, breach of trust and misappropriation of trade secrets, alleging that the respondent Howard Johnson Company ("Howard Johnson") continued to use ice cream formulas originally developed by Beckner after his death in 1968. After a jury returned a verdict for the estate, judgment notwithstanding the verdict was entered for Howard Johnson on the grounds that the applicable statutes of limitation had expired and that the written contract between Beckner and Howard Johnson imposed no limitation on future use of the formulas.[1] On appeal, the Massachusetts Appeals Court affirmed the judgment, holding that the evidence established that Howard Johnson's use of the formulas was with Beckner's consent and that there was no evidence that Beckner had limited Howard Johnson's right to use the formulas after his death, thus precluding recovery under any of the theories advanced. Mrs. Connors sought discretionary further appellate review from the Massachusetts Supreme Judicial Court, which was denied.

REASONS FOR DENYING THE WRIT

The Supreme Court should deny certiorari because the specific federal constitutional issues raised in the petition were not presented in a timely manner to the

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[1] The other opinions cited at pp. 1-2 of the petition refer to denial of a motion to dismiss in 1982, denial of a motion for summary judgment in 1986 and a ruling on a discovery motion in 1985. These nondispositive rulings are of no relevance to any issue possibly before this Court.

Massachusetts state courts. Moreover, there is absolutely no merit to the due process and Seventh Amendment challenges to the judgment notwithstanding the verdict procedure which was the basis of the judgment entered below or the discretionary further appellate review procedure used in Massachusetts. In addition, the petition seeking a writ of certiorari was not timely filed with this Court.

I. BECAUSE NO FEDERAL QUESTION WAS TIMELY RAISED IN THE STATE COURT PROCEEDINGS, SUPREME COURT REVIEW IS NOT AVAILABLE.

The federal constitutional issues Mrs. Connors seeks to raise in her petition were never presented in a timely fashion to the Massachusetts courts.[2] 28 U.S.C. §1257 (1988), which governs Supreme Court review of state court decisions, provides jurisdiction to review such decisions not involving the validity of a statute only when a constitutional right "is specially set up or claimed". The failure to raise a federal question below bars its review by the Supreme Court. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Association, Inc., 360 U.S. 334, 342 n.7 (1959).*

In this case no hint of any federal constitutional claim was raised in the trial court, the direct appeal from

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[2] The petition ignores completely Supreme Court Rule 14.1(h), which requires citations to the specific proceedings at which the federal questions sought to be resolved were raised.

the judgment notwithstanding the verdict, or the request for further appellate review from the Massachusetts Supreme Judicial Court. The first specific mention of any federal issue was a reference to the Seventh Amendment in a motion directed to Justice Souter of this Court dated February 3, 1992, requesting a further extension of time to file a petition for certiorari.

In a July 17, 1991 letter from Mrs. Connors to the Chief Justice of the Massachusetts Supreme Judicial Court, which was treated as a motion for reconsideration from the denial of further appellate review, there was a general request to "grant me my rights under the Constitution of the United States." That is the only reference anywhere in the state court proceedings to the federal Constitution. Even if such a generic reference to the Constitution were considered sufficiently specific to raise the federal questions now sought to be presented, the Massachusetts courts would not consider them because they were not timely raised below. *Paro v. Longwood Hospital, 369 N.E.2d 985, 989 n.9 (Mass. 1977).* Similarly, this Court has ruled that a timely motion for rehearing of the final state appellate decision on the merits is too late to raise a federal question sufficient to invoke Supreme Court jurisdiction. *Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).* The untimely and unauthorized motion for reconsideration from the denial of discretionary Supreme Judicial Court review which occurred here was even more obviously too late to preserve any federal question. Accordingly, there is no jurisdiction to issue a writ of certiorari.

II. THERE IS NO MERIT TO THE FEDERAL CLAIMS PETITIONER SEEKS TO ASSERT.

Petitioner's procedural due process and Seventh Amendment challenges to the judgment notwithstanding the verdict procedure used in this case are completely without merit. Rule 50(b) of the Federal Rules of Civil Procedure does not violate the Seventh Amendment's guarantee of a jury trial. *Neely v. Eby Construction Company, 386 U.S. 317, 321 (1967).* The Massachusetts judgment notwithstanding the verdict procedure is the same as the federal procedure approved in *Neely*. Petitioner also erroneously claims that there is no common law basis to support the judgment notwithstanding the verdict procedure. To the contrary, the same result was achieved under the common law by the judge reserving ruling on a motion for directed verdict and then sending the case to the jury. Rule 50(b) of the Federal Rules of Civil Procedure merely codified this long standing procedure which "undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment". *Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 660 (1935).*

Similarly, there is no basis for a federal Constitutional challenge to the Massachusetts practice of limiting Supreme Judicial Court review of cases decided by the intermediate appellate court. The federal and Massachusetts courts agree that the right to appeal is strictly statutory. *Raytheon Manufacturing Co. v. Radio*

Corporation of America, 76 F.2d 943, 946 (CA 1), aff'd, 296 U.S. 459 (1935); *Turgeon v. Turgeon,* 113 N.E.2d 821, 824 (Mass. 1953). The Massachusetts legislature, when it created the intermediate Appeals Court, expressly provided that "there shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by that court, except. . . (b) where leave to obtain further appellate review. . . is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice." Massachusetts General Laws, c. 211A, § 11 (1990 ed.). Because further appellate review by the Supreme Judicial Court is expressly made discretionary by statute, there is no basis for a claim of entitlement to Supreme Judicial Court review at all, let alone the full written decision Mrs. Connors seeks.

III. THE PETITION WAS NOT TIMELY FILED.

Mrs. Connors' failure to file a petition for writ of certiorari or request an extension of time to do so within the 90-day limit established by 28 U.S.C. § 2101(c) (1988) deprives this Court of jurisdiction to consider this matter. *Missouri v. Jenkins, 495 U.S. 33, 45 (1990).* As reflected in the copy of the Massachusetts Supreme Judicial Court docket attached to the Petition, Mrs. Connors' Application for Further Appellate Review was denied on June 24, 1991, not November 26, 1991 as she claims. This denial was the final adjudication by the Massachusetts state courts in this matter and therefore established the trigger date for the 90-day filing period. Mrs. Connors' first application for an extension of time

to file her petition for a writ of certiorari in this Court was by letter dated October 18, 1991, almost 30 days after the expiration of the 90-day requirement.

The trigger date of June 24, 1991, was not affected by either the July 17, 1991, or October 27, 1991 letters from Mrs. Connors to the Supreme Judicial Court, which were treated as motions for reconsideration of the denial of further appellate review. Neither letter was a "timely filed" petition for rehearing under Supreme Court Rule 13.4 sufficient to restart the 90-day period for filing a petition for certiorari. While Rule 27 of the Massachusetts Rules of Appellate Procedure provides for a petition for rehearing within fourteen days after the date of the rescript issued in connection with a decision on the merits by appellate courts in Massachusetts, there is no provision for a petition for rehearing with respect to an order denying further appellate review, for which no rescript issues. Moreover, even if the denial of further appellate review was considered the equivalent of issuance of a rescript, so that a petition for rehearing was authorized, Mrs. Connors' first letter was not filed until more than three weeks after the denial and was therefore untimely.

As a result, Mrs. Connors' first request for an extension of time in this Court was untimely under Supreme Court Rule 30.2 because it was not presented within the 90-day period permitted to file the underlying petition for a writ of certiorari. Since this Court has "no authority to extend the period for filing except as Congress permits" (*Missouri v. Jenkins, supra*), the

extensions of time allowed were unauthorized and the petition should be dismissed as untimely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 24, 1992

No. 91-1673

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

ELAINE A. (BECKNER) CONNORS,
ADMINISTRATRIX, PETITIONER

V.

HOWARD JOHNSON COMPANY, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS SUPREME JUDICIAL
COURT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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May 21, 1992

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Petitioner, Elaine A. Connors (F/K/A Elaine A. Beckner), Administratrix of the Estate of Paul H. Beckner, brought this suit against the Howard Johnson Company ("Howard Johnson") to recover damages sustained following the death of Beckner for Beckner's estate.

Howard Johnson has carefully avoided any reference to prior decisions of the Massachusetts Courts upholding the fact that the statutes of limitations for contracts under seal are governed by Mass. General Law 260, S 12, which is twenty years.

The Massachusetts Appeals Court did not agree with the Trial Judge that the statute of limitations had expired or with her interpretation of the written contract. The Appeals Court decision was based on their interpretation of the

written contract, which they state, cannot be read, that Beckner restricted the use of his early formulas, when in fact that is exactly how it should have been read, considering the evidence at the trial. There was evidence that the contract Beckner had signed did not cover the entire agreement between the parties. Contrary to the Appeals Court decision, the contracts entered into evidence were not identical.

Had the Trial Judge denied motion for judgement notwithstanding the verdict and upheld what appeared to be a unanimous jury decision for Connors, it is very probable that this case may never have reached the Massachusetts Appeals Court. There would have been no violation of Connors' Seventh Amendment Rights and the violation of Due Process under the Fourteenth Amendment of the

United States Constitution. All of the questions raised now by Howard Johnson were answered by the jury in their initial verdict, or could have been answered by the jury as requested by Petitioner's legal counsel, prior to the jury's dismissal by the Trial Judge.

Since Howard Johnson has admitted that Beckner developed the ice cream formulas (Counter Statement of the Case, page 1) it seems clear that the jury's verdict was sound and correct.

The claim by Howard Johnson, that there is no evidence that Beckner planned to limit, restrict or deny Howard Johnson the use of his formulas is not consistent with Beckner's decision to deny two previous employers the use of his formulas, prior to his employment with Howard Johnson. This decision by Beckner resulted in a

subsequent loss of ice cream business for those firms, and are evidence of Beckner's intent to deny Howard Johnson further use of his formulas after completion of his employment contract.

Beckner lost personal control of his early formulas after he sustained a work related injury while on a business trip to a Howard Johnson ice cream plant in Florida to inspect production and quality control of ice cream being produced in a warm climate. He altered his formulas to conform with the climates in different marketing areas.

The fact that the Massachusetts Supreme Judicial Court denied further Appellate Review of an apparent unanimous jury verdict is the basis of Connors' claim of her Due Process rights under the Fourteenth Amendment.

The Jury, after examining the

evidence and hearing witnesses for five and a half days, decided that there was a relationship of trust and confidence between Paul Beckner and Howard Johnson as was demonstrated by the employment contract of 1958 and the employment contract of 1951, which was different from other employment contracts introduced as evidence between Howard Johnson and any other employees. All employment contracts between Howard Johnson and its employees were held in a repository in Company Attorney Eugene Durgin's office in Braintree, Mass.

Each of Howard Johnson's briefs in opposition further support the jury's verdict.

The claim by Howard Johnson that the Petition for a Writ of Certiorari should be denied because the specific Federal issues were not raised in a

timely manner is disproved by Exhibit C. The Clerk of the Massachusetts Supreme Judicial Court (M.S.J.C.) stamped the wrong date of July 17, 1991 on the motion for a rehearing mailed July 3, 1991 and received by the (M.S.J.C.) on July 5, 1991 by certified mail. The claim that the Petition to this court seeking a Writ of Certiorari was untimely was answered personally by Justice Souter by order of the Court. It seems that Howard Johnson doesn't believe that Justice Souter understands the rules of the Supreme Court.

Until the (M.S.J.C.), denied to grant further Appellate Review no Federal question needed to be raised since the (M.S.J.C.) could have ruled that Connors' Seventh Amendment rights were violated by the Massachusetts Appeal Court on a different finding than

the Trial Court and upheld by the jury verdict.

The primary issues of law were resolved by the decisions of Judges Quirico, Tuttle and Rouse as can be determined by the fact that this case was allowed to go to a jury following a mock trial.

The uniqueness of this case comes from the fact that an employee brought trade secrets to his employer including formulas, processes and procedures for making ice cream.

This case differs from another case cited but is most closely analogous to Peggy Lawton Kitchens, Inc. v. Hogan 18 Mass. App. Ct. 937, 939, (1984), and Jet Spray Cooler v. Crampton, 361 Mass. 835 (1973), Businesses established by employees using formulas and processes stolen from their previous employers.

The decision held in E. W. Bliss v. United States, 63 L. ed. 114, the U. S. Supreme Court stated "the case is precisely analogous to a suit to enjoin the unauthorized use or disclosure of a trade secret." Justice Van Devanter stated in Baltimore & Carolina Line v. Redman, 295 U. S. 660, "but whatever may have been its origin or theoretical basis, it was well established when the Seventh Amendment was adopted, and therefore, must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment." Baltimore & Carolina Line also held that "issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."

CONCLUSION

In conclusion, it has been established by the jury that there was a relationship of trust and confidence between Howard D. Johnson and Paul H. Beckner so that Howard Johnson was restrained by the relationship under which it acquired the earlier formulas.

For the reasons stated previously, and affirmed by the jury, the verdict should be upheld and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No.

A-610

Elaine A. Connors,

Petitioner

v.

Howard Johnson Company

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including March 27, 1991.

/s/David H. Souter
Associate Justice of the Supreme Court
of the United States

Dated this 20th day of February, 1992.

SUPREME JUDICIAL COURT

Boston, Massachusetts 02108

Edward M. Tumavicus

Legal Counsel to the

Chief Justice

4 May 1992

Elaine A. Beckner Connors

103 Brookfield Drive

Brockton, MA 02402

Dear Mrs. Connors:

Chief Justice Liacos has asked me to review and respond to your letter of April 27,1992, regarding your request for further appellate review.

With respect to your request for clarification of the date that your 1991 request for reconsideration was received by the Supreme Judicial Court,

you are correct that the July 17, 1991, time stamp on that document does not reflect the date the request was received by the Supreme Judicial Court. The time stamp reflects the date that the request was received by the Clerk's Office for the Commonwealth from the Office of the Administrative Assistant to the Justices of the Supreme Judicial Court. An internal Supreme Judicial Court memorandum from John Burke to Clerk Kennett, a copy of which you have included in the materials you sent to Chief Justice Liacos, reflects that the request was received by the Court on or before July 12, 1991. Unfortunately, the Clerk's office for the Commonwealth has been unable to locate any records indicating the exact date on which your request was received by the Court.

In your April 27, 1992, letter to

Chief Justice Liacos, you also have requested that the Court reconsider your application for further appellate review. The basis for this request appears to be your belief that the Court denied your 1991 request for reconsideration because it treated the request as not timely filed. The records of the Clerk's Office for the Commonwealth reveal, however, that your 1991 request was given full consideration by the Court and was denied on substantive grounds, rather than on any issue of timeliness.

I hope that this information has been helpful. Please be aware that your April 27, 1992, letter has not been treated as a request for reconsideration. If you wish to bring such a request to the Court, please file your motion directly with the Clerk's

Office for the Commonwealth.

Sincerely,

Edward M. Tumavicus

EMT:jeh

cc.: Francis C. Lynch, Esquire
Palmer and Dodge
One Beacon Street
Boston, MA 02108

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